No. 22413

In the United States Court of Appeals for the Ninth Circuit

STATE OF WASHINGTON, APPELLANT

v.

STEWART L. UDALL, Secretary of the Interior, ET AL., APPELLEES

Appeal from the United States District Court for the Eastern District of Washington, Northern Division

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BRIEF FOR THE UNITED STATES AND ITS OFFICERS, APPELLEES

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OPINION BELOW

The unreported oral opinion of the district court is attached to its judgment (R. 152-155).

JURISDICTION

The complaint stated (R. 2):

> The plaintiff seeks a declaratory judgment, injunctive relief, and relief of the nature of man-

damus under the Declaratory Judgment Act, 28 U.S.C. § 2201 (1964); the Administrative Procedure Act § 10, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1964); and 28 U.S.C. §§ 1331 and 1361 (1964). The plaintiff seeks a judgment for damages against the United States under 28 U.S.C. § 1346 (1964).

Appellees moved to dismiss (R. 35-36), which was granted, and judgment of dismissal was entered on July 7, 1967, as to all federal defendants, pursuant to Rule 54(b), F.R.Civ.P. (R. 149-151). Notice of appeal was filed on August 30, 1967 (R. 159-160). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the United States has consented to suit for a declaratory judgment establishing the right of the State of Washington to secure water from a federal project free of specified restrictions and

2. Whether such a suit will lie to enjoin federal officers from enforcing such limitation and compelling them by relief in the nature of mandamus to deliver water as demanded by the State and

3. Whether the United States has consented to suit in the United States District Court for the Eastern District of Washington for damages as sought by the plaintiff.

STATUTES INVOLVED

28 U.S.C. sec. 1346 provides:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. sec. 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 U.S.C. sec. 2201 provides:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

5 U.S.C. sec. 703 (formerly part of Section 10 of the Administrative Procedure Act) provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

STATEMENT

Since this case was dismissed on motion, the facts are those as alleged in the complaint, together with federal legislation. In brief, the allegations are that the State owns some 14 tracts of school lands, containing a total of 1,594 irrigable acres, located within the South Columbia Basin Irrigation District (R. 3-4; Ex. A, B, R. 13, 14). The United States owns and operates the irrigation system within the District (R. 4).

The Columbia Basin Project was undertaken pursuant to the Columbia Basin Project Act, 16 U.S.C. sec. 835, for reclamation features of Grand Coulee Dam. The policy of the reclamation law has been to confine the benefits of irrigation to no more than 160 acres of land in a single ownership. *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275 (1958). This

is expressed in Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 629, as amended, 43 U.S.C. sec. 423(e) (*Id.*, pp. 292, 297). This policy was applied to the Columbia Basin Project by process of dividing the benefited area into irrigation blocks and establishing farm units of no more than 160 acres within the blocks. As a condition to receipt of water, landowners were required to execute recordable contracts to sell their excess land—i.e., that which exceeded the maximum acreage from the farm unit—at an appraised value which would exclude enhancement due to the project. 16 U.S.C. sec. 835a. By amendment of 1950, special provision was made, stating, in effect, that purchasers from the State should not be disqualified from executing recordable contracts because of the price paid to the State as a result of a program agreed to between the State and the Secretary for offering state lands. 16 U.S.C. sec. 835c-3. Attached to the complaint as Exhibit D is a contract dated September 12, 1951, between the State and the United States which provided *inter alia*, that purchasers would enter into recordable contracts, with the United States, enforcing the excess land law (Exhibit D to complaint, R. 17-25). The special 1950 provision was repealed by the Act of October 1, 1962, 76 Stat. 678.

Federal officers, the complaint alleged, thereafter expressed an intention to refuse to acknowledge continuing obligation of the 1951 contract, to deliver water to state school lands and to execute recordable contracts with purchasers (R. 5-6). Allegedly for the purpose of resolving questions, the State paid assess-

ments for two farm units, designated portions thereof as its non-excess land and demanded delivery of water to the portion not designated as non-excess land (R. 7). This demand was refused absent execution of a recordable contract (R. 7).

The State alleged that it was powerless to execute a contract, that it refused to do so for various reasons, and that the refusal of federal officers was unlawful, arbitrary and capricious, and stated (R. 8):

> The defendant officers' refusal to deliver water as demanded has damaged the State of Washington in the sum of $5,000. The defendant officers' refusal to deliver water in the future threatens damages to the State of Washington in a sum in excess of $10,000.

The relief sought was various declarations of law; injunctions against requiring recordable contracts as to any state school lands and against refusing to execute contracts with the purchasers of such lands; an order in the nature of mandamus to compel delivery of water as demanded by the State and judgment for $5,000 (R. 10). Alternatively, it asked for a judgment declaring the rights under the 1951 contract and $1,000 (R. 11).[1]

The United States and its officers moved to dismiss on several grounds (R. 35-36). After briefing and argument, the district court entered final judgment of dismissal under Rule 54(b) on the grounds, elaborated on in its oral opinion attached to the judgment,

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[1] In a second alternative prayer, relief was asked against the South Columbia Irrigation District.

that the United States had not consented to be sued; that the attempted suit against the federal officers was, in essence, an action against the United States; and that the Tucker Act claim was an "impermissible splitting of plaintiff's cause of action" (R. 149-150).

ARGUMENT

I

The United States Has Not Consented to This Suit

A. *The United States has not consented to the award of specific relief against it.*—In *City of Fresno* v. *California*, 372 U.S. 627 (1963), a claim was made by the City of a right to receive water from a reclamation project at certain prices. The Supreme Court affirmed this Court's holding that the United States had not consented to that suit. The property involved in the present case is irrigation water produced by the federal reclamation project. In essence, the State in this action seeks by specific relief to secure the rights it claims to such waters free of the excess land law requirements. But the United States has not consented to a suit seeking a court order directing conveyance of federal property to the plaintiff. This Court so declared in *White* v. *Administrator of General Services Admin. of U. S.*, 343 F.2d 444 (1965), when it said (pp. 445-446):

> The object of the appellants in the instant suit is to get the title out of the United States and into the appellants. A suit with such an objective is a suit for specific performance, regardless of what may be said in the complaint which initiates the suit. And, the title to the interest which

> the court is asked to order to be conveyed to the appellants being now in the United States, the order would have to be made against the United States. It follows that the United States would have to be a party to the suit.
>
> If the fact that the United States is not named as a party in the suit could be overlooked and, though not named, it were treated as the real party in interest, which it is, the suit would still have to be dismissed, because the United States has not consented to be judicially compelled to perform its contracts. From the beginning of its history, the United States asserted and maintained complete immunity from suit until Congress, by the Act of February 24, 1855, 10 Stat. 612, created the United States Court of Claims and gave consent for the United States to be sued for compensation for certain breaches of duty, one of which was breach of contract. The Act of March 3, 1887, 24 Stat. 505, 28 U.S.C. § 1346, conferred a partly parallel jurisdiction upon the United States District Courts. Those statutes have never been regarded as having given consent that the United States could be ordered by a court to specifically perform a contract.

After referring to several decisions concerning sovereign immunity, including *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949), it continued (p. 446):

> * * * In our case, if the appellants are given the relief which they seek, the appellees will have to sign the name of the United States of America to a deed conveying an interest in land. No one can do that as an individual. When considered in relation to the Larson opinion, the instant case is an *a fortiori* case.

> Even the dissenting Justices in Larson would have decided the instant case as we decide it. * * *

In *United States* v. *Sherwood*, 312 U.S. 584 (1941), the Court said (p. 588) that the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States" and (p. 591) that the Tucker Act jurisdiction to adjudicate claims against the United States "does not extend to any suit which could not be maintained in the Court of Claims." It can make no difference that the property sought to be obtained is the right to water from a reclamation project, rather than, as in *White*, title to a particular tract of land.

B. *The Declaratory Judgment Act, 28 U.S.C. sec. 2201, is not a consent to sue the United States.*—In *White*, *supra*, this Court so held, saying (p. 447): "We find nothing in the statutes relating to declaratory judgments or administrative procedure which is helpful to the appellants." Earlier, this Court in *Brownell* v. *Ketchum Wire & Mfg. Co.*, 211 F.2d 121 (C.A. 9, 1954), held (p. 128): "It is true that the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is not a consent of the United States to be sued, and merely grants an additional remedy in cases where jurisdiction already exists in the court." Accord *Anderson* v. *United States*, 229 F.2d 675, 677 (C.A. 5, 1956). Plainly, the immunity of the United States from judgments for specific relief cannot be avoided by the simple expedient of asking for a declaration that the State has a contractual right to receive water

from the federal project without condition and free of restrictions. Cf. *City of Fresno, supra,* where the City asked for a declaration as to its entitlement to project water.

C. *The Administrative Procedure Act, now 5 U.S.C. sec. 701, is not a consent of the United States to suit.*—This Court in the quotation in *White, supra,* disposed of the Administrative Procedure Act (here for brevity "A.P.A.") as a ground for jurisdiction. *City of Fresno, supra,* is squarely in point on the facts of this case. While the A.P.A. is not mentioned in that opinion, it is not to be supposed that the courts and counsel in *Fresno* and the companion case of *Dugan* v. *Rank,* 372 U.S. 609 (1963), overlooked a clear basis for jurisdiction in those cases. One basic reason the Administrative Procedure Act cannot be read as a consent to the award of specific relief is the one given in *White* for rejecting appellants' reliance there on the 1962 mandamus statute. This Court there said (p. 447):

> To find in § 1361 such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government, i.e., that the courts do not have jurisdiction to order the Government to specifically perform its contracts, would be to make too much of a short and simple piece of legislation.

There is nothing in the language or the history of the Administrative Procedure Act to justify the suggested waiver of immunity. Besides *White, Chournos* v. *United States,* 335 F.2d 918, 919 (C.A. 10, 1964), is squarely in point. The court there declared:

> The Administrative Procedure Act, 5 U.S.C. § 1001 et seq., does not purport to give consent to suits against the United States. The Act provides that the person suffering legal wrong because of any agency action, or who is adversely affected or aggravated by such action, shall be entitled to judicial review. This review may be obtained only by an appropriate action in "any court of competent jurisdiction." Such an action may not be maintained if the court lacks jurisdiction upon any ground. [Footnotes deleted.]

The Eighth Circuit has recently concurred. *Twin Cities Chippewa Tribal C.* v. *Minnesota Chippewa Tribe*, 370 F.2d 529 (1967). It dismissed a suit against an Indian tribal corporation and the Secretary of the Interior for lack of jurisdiction, saying (p. 532):

> Secondly, plaintiffs assert that the District Court has jurisdiction over the Secretary of the United States Department of the Interior by virtue of § 10 of the Administrative Procedure Act, 5 U.S.C.A. § 1009, 5 F.C.A. § 1009. The alleged "agency action" is assertedly found in 25 U.S.C.A. § 476, 25 F.C.A. § 476, which provides in part as follows: "Amendments to the constitution and bylaws *may* be ratified and approved by the Secretary * * *." (Emphasis supplied.) This reliance on § 10 of the Administrative Procedure Act to establish jurisdiction below is misplaced. Section 10 of the Act does not confer jurisdiction upon the federal courts. Its purpose is to define the procedures and manner of judicial review of agency action rather than confer jurisdiction. Ove Gustavsson Contr. Co. v. Floete, 278 F.2d 912, 914 (2nd Cir. 1960); Barnes v. United

> States, supra. Additionally, § 10 does not in itself amount to congressional consent to a suit against defendants, whose right to assert the defense of sovereign immunity is discussed above. Chournos v. United States, 335 F.2d 918 (10th Cir. 1964).

Accord *Cyrus* v. *United States*, 226 F.2d 416, 417 (C.A. 1, 1955); *Aktiebolaget Bofors* v. *United States*, 194 F.2d 145, 149 (C.A. D.C. 1951).

As these cases show, the A.P.A. does not purport to grant federal courts jurisdiction over any case, nor to consent to suit against the United States in any form. Instead, it refers to "any applicable form of legal action * * * in a court of competent jurisdiction." 5 U.S.C. sec. 703. The attempted invocation of the A.P.A. to justify the present suit against the United States highlights the error of the dictum of a few cases that the Act is a waiver of soverign immunity or consent of the United States to suit. While apparently a difference merely of phrasing, the distinction between those two expressions is important. So far as we can recall, Congress has never merely waived the sovereign immunity from suit and thus, for example, permitted a suit against its officers, which would otherwise constitute a suit against the United States, to continue. Waivers of immunity have been intentional, specific and partial only and are accomplished by statutes consenting to suit which designate the terms upon which and the manner in which relief can be obtained against the United States. The restrictions upon consent limit the jurisdiction of the courts and cannot be waived, e.g., *Dugan* v.

Rank, supra; Munro v. *United States*, 303 U.S. 36 (1938); *Soriano* v. *United States*, 352 U.S. 270, 273-274 (1957); *Edwards* v. *United States*, 163 F.2d 268 (C.A. 9, 1947). *United States* v. *Sherwood*, 312 U.S. 584 (1941), held that nothing in the Federal Rules of Civil Procedure constituted a consent to sue the United States, emphasizing the rule that "the terms of its [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit" (p. 586) and that the "consent, since it is a relinquishment of a sovereign immunity, must be strictly interpreted" (p. 590).

The cases cited by appellant do not justify its position here. Primarily, it relies on *Coleman* v. *United States*, 363 F.2d 190 (C.A. 9, 1966), aff'd on reh., 379 F.2d 555 (1967). Certiorari was granted in that case (389 U.S. 970) and it now awaits argument. In any event, it was a suit brought by the United States and, on rehearing in this Court, the Secretary of the Interior was joined as a party so that the langauge as to the effect of the A.P.A. was pure dictum. *Adams* v. *Witmer*, 271 F.2d 29 (C.A. 9, 1958), reh. den., 271 F.2d 37 (1959), likewise did not involve the United States as defendant. Nor did the other cases cited by appellant (Br. 21-27). As to the merits of the dicta of these cases, they suggest neither statutory language nor reasoning justifying a conclusion that the A.P.A. is a consent to sue the United States. *Adams* v. *Witmer* does not even say that it is. Nor does *Coleman*. Since the United States had been plaintiff, *Coleman* did not involve and did not discuss any issue of court jurisdiction. *Mulry* v. *Driver*, 366 F.2d

544 (C.A. 9, 1966), was brought against the United States but found "the necessary consent of the United States" under the A.P.A. (p. 547). It made no attempt to explain why Congress should be deemed to have reached the result (which is, so far as we know, completely novel in the law) of "consenting" to a suit to which the United States would not be a party. The opinion actually does not discuss court jurisdiction but rather scope of review of administrative decision. And all of the discussion is dictum, since the court agreed that the action of the district court in dismissing the action was right.[2] None of the other cases supports the attempt here to sue the United States, except possibly *Estrada* v. *Ahrens*, 296 F.2d 690 (C.A. 5, 1961). That case represented the belief of the Fifth Circuit (296 F.2d at p. 698) that "The doctrine [of sovereign immunity] is wearing thin. Recent years have witnessed a great expansion of the individual's rights to seek redress against the government for wrongs committed by it." About a year earlier, the same Circuit had rejected the defense of sovereign immunity in *Bowdoin* v. *Malone*, 284 F.2d 95 (C.A. 5, 1960), which the Supreme Court reversed, *Malone* v. *Bowdoin*, 369 U.S. 643 (1962). The *Estrada* reasoning is thus, we submit, based on a wrong premise and is not persuasive.

The consequence of acceptance of the State's argument demonstrates its invalidity. It would mean that unfavorable positions relating to government con-

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[2] Since this was the action taken, further review on any issue of effect of the A.P.A. was not available.

tracts could be reviewed in any court at the plaintiff's choosing by the simple expedient of attaching the label "judicial review" of the federal agents' disagreement with the plaintiff's views as to his rights. Since the A.P.A. is not limited to cases where the issue is contract rights, the same conclusion would follow as to all agency rejections of claims based on statute, contesting regulations, or challenging almost any governmental action. The 1962 mandamus statute, discussed, *infra*, and almost all statutes for review of federal agency decisions would become surplusage and useless acts by Congress under that view. Practically every case sustaining sovereign immunity since adoption of the A.P.A. in 1946 would be wrong. This Court's refusal in *White*, *supra*, to read the A.P.A. to constitute such a "revolutionary step on the part of Congress" (343 F.2d at p. 447) should be followed here.

D. *The consent to sue the United States in this case cannot be found in the Tucker Act.*—Appellant now relies on 28 U.S.C. sec. 1346, commonly called the Tucker Act, to justify jurisdiction of this case as an independent ground of jurisdiction. In the trial court, it vacillated on this question. The complaint alleged (R. 2):

> The matter in controversy upon which the plaintiff seeks a declaratory judgment, injunctive relief, and relief in the nature of mandamus exceeds the sum or value of $10,000, exclusive of interest and costs. The plaintiff's claim for damages against the United States does not exceed $10,000 in amount.

As noted *(supra)*, the complaint claimed $5,000 damages for the refusal to deliver water but alleged prospective damages from such refusal in excess of $10,000 (R. 8) and an alternative that if the excess land provisions are held to be applicable to that portion of Farm Tracts 34 and 35 not designated non-excess, then the State has been damaged $1,000 (R. 9). The relief sought included damages of $5,000 and alternatively $1,000 (R. 10-11).

In its memorandum in opposition to the motion to dismiss, the State said (R. 68): "In both instances the state seeks damages under the Tucker Act, 28 U.S.C. § 1346(a)(2), as supplemental relief" and that "If the state secures relief from the administrative determination * * * this court has jurisdiction under the Tucker Act" (R. 78) and stated (p. 79):

> However, this claim to damages is merely supplemental to the main relief sought. If the main relief cannot be granted because of the doctrine of sovereign immunity, the state's damages would exceed the $10,000 jurisdictional limitation of this court. In that event the state would decline to waive the excess[27] and would pursue its cause of action in the court of claims. But until this latter event occurs, this court's jurisdiction over the United States as a named defendant cannot be questioned.

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[27] As it may do to preserve this court's jurisdiction, United States v. Johnson, 153 F.2d 846 (9th Cir. 1946).

Because of these acknowledgments, the United States "put to the side, for the purpose of this Reply,

the State's claims against the United States for money damages" (R. 98).[3] In a supplemental memorandum, the State said it wished to modify its position on this subject (R. 119). It now said (p. 120):

> The state has now reconsidered the matter. Whether the main relief is granted to it or not, the state stipulates that it waives all claims for damages to Farm Unit 35, Irrigation Block 23, in excess of the court's jurisdictional limits. This stipulation is made to preserve the court's jurisdiction within the rule announced in *United States* v. *Johnson*, 153 F.2d 846 (9th Cir. 1946).

The district court held that it would be splitting of causes of action to permit litigation of every farm unit as a separate lawsuit (R. 154). In support of rehearing, the State contended that it does not have a present claim for damages to school lands other than Farm Unit 35 because it has not yet paid assessments and, until such payments, it is not entitled to delivery of water (R. 139-140). It further argued that claims for separate parcels were separate causes of action (R. 139-144). The argument is copied in the State's brief here (pp. 30-35).

The law is clear that a claimant against the United States may not split his cause of action so as to avoid the limitations of the Tucker Act. *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F.2d 849 (C.A. 1, 1947). Plainly, the State cannot achieve the same result here by its own act in withholding pay-

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[3] The United States' opening brief had made the point that the State was claiming more than $10,000 past and future damages, beyond the Tucker Act limit (R. 51-52).

ment of assessments on other parcels and thus, in its view, precluding the maturing of a cause of action as to those parcels.

The basic principle applicable here was declared on *Baltimore S. S. Co.* v. *Phillips*, 274 U.S. 316, 321 (1927):

> A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong.

The principle is demonstrated in *Evans* v. *Durango Land & Coal Co.*, 80 Fed. 433, 437 (C.A. 8, 1897), where the court stated:

> It is doubtless true that so much of the plaintiff's claim as is founded upon trespasses committed prior to December 31, 1894, is subject to certain defenses, which cannot be as well made against the claim for trespasses committed subsequent to that date; but the fact that different defenses may be pleaded to parts of an entire claim does not establish that the claim itself is made up of different and independent causes of action.

Here the right asserted is to receive water from the project and, more important, to sell state lands free of the 160-acre restrictions. The legal wrong alleged is the refusal to recognize that right. The refusal to deliver water, the refusal to permit the State sales it desires, and the refusal to offer the

purchasers recordable contracts are all different consequences of that alleged wrong. The State has very clearly refused to reduce its claim to all damages, present or future, arising from the alleged wrong below $10,000. The fact that, in other situations, separate parcels of land may constitute separate causes of action, as illustrated by appellant's citations (Br. 31-35), does not alter the fact that this case involves a single alleged right and a single wrong.[4] That result is even clearer if the case is considered to involve simply repudiation of the contract of 1951.

II

This Suit Will Not Lie Against the Federal Appellees

A. *Except for the 1962 mandamus statute, the district court had no jurisdiction over the Secretary of the Interior and the Acting Commissioner of Reclamation.*—In *Ernst* v. *Secretary of the Interior*, 244 F.2d 344 (C.A. 9, 1957), this Court, in summarily affirming, held that the Secretary of the Interior and the Solicitor of that Department could not be sued outside the District of Columbia, saying (pp. 345-346):

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[4] The discussion in *United States* v. *Pan-American Petroleum Co.*, 55 F.2d 753 (C.A. 9, 1932), cert. den., 287 U.S. 612, emphasizes the fact that cause of action includes "the plaintiff's primary right which has been invaded, and the wrongful act or default—the delict—of the defendant by which the right is broken" (p. 776). That case also illustrates the fact that, depending on circumstances, splitting a cause of action may not be fatal, as it is here because of the Tucker Act restriction on the consent to sue the United States.

> The order to quash and dismiss the case as against the Secretary and the Solicitor was clearly correct inasmuch as the court lacked jurisdiction of those officers. Their official residence is in Washington, D. C. The governing statute (28 U.S.C.A. § 1391(b) provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." There is no statutory authority for instituting suit against these officials elsewhere than in their place of residence.

This was applying well-settled law. *Martinez* v. *Seaton*, 285 F.2d 587 (C.A. 10, 1961). In *Ernst*, the district court said (see record of *Ernst*):

> The Secretary of the Interior and the Solicitor of the Department of the Interior have appeared specially by the United States Attorney and moved the court for an order quashing the return of service of summons and dismissing the complaint, upon the grounds that these Government officials are residents of the District of Columbia and such action can be brought against them only in the district of their official residence.
>
> Jurisdiction to review such decision could only be conferred by the provisions of Sec. 10 of the Administrative Procedure Act, Title 5, Sec. 1009, U.S.C., upon which plaintiff relies. This statute provides for judicial review of "agency action" of any administrative authority or agency of the United States, which proceeding, in the absence of any specific statute, may be brought "in any court of competent jurisdiction". It is well settled that

any action under the provisions of this Act against a public official of the United States in his official capacity can only be maintained at the official residence of such official, within the meaning of Title 28, Sec. 1391, U.S.C.A. *Blackmar* vs. *Guerre*, 342 U.S. 512, 516; *Trueman Fertilizer Co.* vs. *Larson*, (CCA 5), 196 F.2d 910; *Nesbitt Fruit Products Inc.*, vs. *Wallace*, 17 F. Supp. 141; *Torres* vs. *McGranery*, 111 F.Supp. 241; *Muerer* vs. *Ryder*, 137 F.Supp. 362; *Clement Martin* vs. *Dick Corp.*, 97 F.Supp. 961.

Compare *Wilson* vs. *United States Civil Service Commission*, 136 F.Supp. 104, and *Kansas City Power and Light Co.* vs. *McKay*, 225 F.2d 924, where actions to review agency decisions were properly in the U.S. District Court for the District of Columbia. In the Kansas City Power case the court expressly holds that the Administrative Procedure Act does not of itself establish the jurisdiction of the Federal Courts over an action not otherwise cognizable by them, or does not render competent a court which lacks jurisdiction upon any other ground (p. 933).

As the official residence of the Secretary of the Interior and the Solicitor of the Department of the Interior was and is in the District of Columbia this action cannot be maintained against them in this District. See cases above cite, and *Anno. Title 28, Sec. 1391, U.S.C.A., note 49.*

The Supreme Court, in *Blackmar* v. *Guerre*, 342 U.S. 512, 515-516 (1952), stated:

> It is further suggested that judicial review is authorized by the Administrative Procedure Act, 5 U.S.C. & 1001 *et seq.* Certainly there is no specific authorization in that Act for suit against the Commission [the Civil Service Commission]

> as an entity. Still less is the Act to be deemed an implied waiver of all governmental immunity from suit. If the Commission's action is reviewable under § 1009, it is reviewable only in a court of "competent jurisdiction." [Footnotes deleted.]

Under these authorities, the district court lacked jurisdiction over the Secretary of the Interior and the Acting Commissioner of Reclamation, both of whom had their "principal place of business," as the complaint put it (R. 2-3), in Washington, D. C.

B. *The 1962 mandamus statute did not vest the district court with jurisdiction over the Secretary and the Acting Commissioner.*—Historically, there has always been a distinction between mandamus and specific performance. Since Section 1361 deals with mandamus, it cannot be read to mean the entirely different remedy of specific performance. "Federal Courts are courts of limited jurisdiction, having only such jurisdiction as is expressly conferred by statute." *Rambo* v. *United States*, 145 F.2d 670, 671 (C.A. 5, 1944), cert. den., 324 U.S. 848. The difference between mandamus and specific performance is clearly stated in 34 Am. Jur. 814, Section 9:

> Although mandamus has been compared to a bill for specific performance, the two remedies are quite different, both in respect to the jurisdiction to issue them and the relief which they afford. Specific performance is an equitable remedy designed to compel parties to contracts to perform them according to their terms, while mandamus is a legal remedy having for its purpose the compulsion of legal duties resting on officers or

others. Both remedies operate largely in personam.

The writ of mandamus should not "be so perverted as to make it serve the purposes of an ordinary suit." *International Contracting Co.* v. *Lamont*, 155 U.S. 303, 309 (1894). Mandamus will not lie against a government officer "unless the laws require him to do what he is asked in the petition to be made to do." *Id.*, p. 308. The function of mandamus (and injunction against a federal officer) is to "enforce ministerial duties of executive officers by mandates of Congress." *Transcontinental & Western Air* v. *Farley*, 71 F.2d 288, 291 (C.A. 2, 1934). The fact that a contract might have been breached under general law does not supply the "law requiring" the officers to convey. As was said in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 701-702, 704-705 (1949):

> * * * the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.
>
> * * * *
>
> * * * For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act.

There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right. As was early recognized, "The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief. . . ."

There are limits, of course. Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, it is proper that the courts have the power to grant relief against those actions. But in the absence of a claim of constitutional limitation, the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention outweighs the possible disadvantage to the citizen in being relegated to the recovery of money damages after the event.

It is argued that a sales agency, such as the War Assets Administration, is not the type of agency which requires the protection from direct judicial interference which the doctrine of sovereign immunity confers. We do not doubt that there may be some activities of the Government which do not require such protection. There are others in which the necessity of immunity is apparent. But it is not for this Court to examine the necessity in each case. That is a function of the Congress. The Congress has, in many cases, entrusted the business of the Government to

> agencies which may contract in their own names and which are subject to suit in their own names. In other cases it has permitted suits for damages, but, significantly, not for specific relief, in the Court of Claims.

To entitle appellant to the relief which it seeks under Section 1361, there must be found within that section itself that the United States has waived its sovereign immunity and has consented to be sued through its officers for specific performance. But, as the court held in *McEachern* v. *United States*, 212 F.Supp. 706, 712 (W.D. S.C. 1963):

> This Act does not create new liabilities or new causes of action against the United States Government or its officials. United States Code Congressional and Administrative News, 87th Congress—Second Session, 1962, No. 17, pages 2784, 2785, 2787.

In *Rose* v. *McNamara*, 225 F.Supp. 891, 893 (E.D. Pa. 1963), the court held that Section 1361 "did not restrict previous notions of sovereign immunity nor did it authorize actions previously prohibited which, though in form against the officer, were in reality against the United States."

The purpose of the bill which became Section 1361 was stated by the Senate Committee on the Judiciary to be (U.S. Code Congressional and Administrative News, 87th Cong., 2d sess., p. 2784):

> The purpose of the amendments is to provide specifically that the jurisdiction conferred on the district courts by the bill is limited to compelling a Government official or agency to perform a

> duty owed to the plaintiff or to make a decision, but not to direct or influence the exercise of discretion of the officer or agency in the making of the decision * * *.

The Deputy Attorney General of the United States stated in a letter to the Chairman of the Senate Committee on the Judiciary as follows (*Id.*, p. 2788):

> We think it essential that the section refer to the "mandamus" power and specifically limit its exercise to ministerial duties owed the plaintiff.

Here again this Court's *White* decision gives the answer in rejecting the claim that the mandamus statute authorized the suit seeking specific relief. This Court said (p. 447):

> To find in § 1361 such a revolutionary step on the part of Congress as the overturning of what had been settled law since the foundation of the Government, i.e., that the courts do not have jurisdiction to order the Government to specifically perform its contracts, would be to make too much of a short and simple piece of legislation. In McEachern v. United States, 212 F.Supp. 706, 712 (E.D. Va.) the court said, of § 1361:
>
> > "The Act does not create new liabilities or new causes of action against the United States Government or its officials,"
>
> and cited the pertinent legislative history in support of its statement. In Rose v. McNamara, 225 F.Supp. 891, 893 (E.D. Pa.), the court said that § 1361
>
> > "did not restrict the previous notions of sovereign immunity nor did it authorize actions previously prohibited which, though

> in form against the officer, were in reality against the United States."
>
> See also Sprague Electric Co. v. The Tax Court of the United States, 230 F.Supp. 779, 782 (D.C.Mass.).

C. *The district court had no jurisdiction to award any relief against the other federal officer defendants.* —The other two federal officer defendants are subordinates of the Secretary of the Interior and the Commissioner of Reclamation. *Dugan* v. *Rank*, 372 U.S. 609 (1963), and *City of Fresno* v. *California*, 372 U.S. 627 (1963), are conclusive that a suit of this nature will not lie against local subordinate officers. Here the relief sought is either to secure admittedly federally owned property (the irrigation water) or damages from the United States. There can be no question that such a case is against defendants in their official capacities, seeks to compel official action on their part and, hence, is an attempt to coerce the United States, through its officers. This may not be done, absent congressional consent. Cases such as *Adams* v. *Witmer*, 271 F.2d 29 (C.A. 9, 1958), reh. den., 271 F.2d 37, which justify relief against such subordinate on the ground that it is awarding purely negative relief (see opinion on rehearing, p. 38), are irrelevant here.[5]

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[5] A basic misunderstanding is shown by the invocation of the quotation from Elihu Root that "these agencies of regulation must themselves be regulated" (271 F.2d at p. 38). The Department of the Interior, in handling reclamation programs, is not an "agency of regulation" but rather is an agency dispensing the bounty of Congress. See *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U.S. 275 (1957).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully submitted,

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MARCH 1968

CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROGER P. MARQUIS

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NO. 22414

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN W. ASHY,)

Appellant,)

vs.)

BARCELIZA G. CRUZ, individually and on behalf of her infant child, RICHARD ANTHONY CRUZ,)

Appellee.)

On Appeal from the District Court of Guam
for the Territory of Guam

APPELLANT'S BRIEF

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SUBJECT INDEX

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APPELLANT'S BRIEF

STATEMENT OF THE CASE

This action was commenced in the Island Court of Guam by the filing of a complaint and summons on March 26, 1964, in which the plaintiff, an unmarried woman, sought support for herself and for her unborn child, attorneys' fees, and medical and clothing expenses, on the ground that the defendant was the father of the unborn child. An amended complaint was filed on August 7, 1964, setting forth, among other things, that the child had been born on May 24, 1964. The action was tried before the Island Court on November 3, 1966, and judgment was entered on January 30, 1967. On appeal, the Appellate Division of the District Court of Guam, on August 31, 1967,

affirmed the trial court's judgment.

At the trial the plaintiff testified as to sexual intercourse with the defendant prior to the birth of the child. Corroboration of the plaintiff's allegations consisted of the results of blood tests indicating that the defendant (together with 25% of the United States population) could not be excluded as the father of the child, and offering the child for the court's viewing. The defendant categorically denied an illicit relationship. Apparently to rebut defendant's statement of seeing the plaintiff about ten times during a seven to eight month period, the plaintiff put on as a rebuttal witness an aunt of the plaintiff, who testified as to visits by the defendant to the plaintiff three times a day during a two or three month period, and sometimes five times a day - a frequency far exceeding plaintiff's own testimony.

QUESTION PRESENTED

Did the plaintiff establish the paternity of the defendant by a preponderance of the evidence? Plaintiff testified that she first met the defendant in July of 1963 at the home of a friend. The following is quoted from the transcript concerning the first intercourse:

> "Q. When was the first time?
>
> A. This first time is July or early August or September, in July, August or September, the last part of August or September." Tr. p. 5.

On cross-examination, the plaintiff testified as follows regarding the first intercourse, Tr. pp. 17-19:

> "Q. Now, when you first started testifying, Miss Cruz, you told your attorney that the first time you had sexual intercourse with Mr. Ashy was in August or September, 1963. Do you remember saying that?

A. Yes.

Q. Is that correct?

A. August.

Q. No, you told your attorney the first time that it was either in August or September of 1963. Do you remember saying that?

A. Can I change that to August?

Q. No, answer my question. Do you remember saying it? Now, will you answer my questions and you and I will get along fine.

A. I said August.

MR. PHELAN: She did say August or September.

THE COURT: Will you answer the question?

A. August.

Q. No, Miss Cruz, will you answer my question. Do you remember telling your attorney that it was August or September?

A. I thought I said August.

Q. I didn't ask you what you thought. I am asking you, do you remember telling Mr. Phelan that it was August or September?

A. I know I said August.

Q. I know you said August. Miss Cruz, do you remember telling your attorney first that you said August and September. Do you remember first, do you remember saying it?

A. I said August.

Q. Don't look at Mr. Phelan.

THE COURT: Answer the question, if you remember saying it or not.

A. I don't know whether I said August or September but I know I said August. I don't remember whether I said September because I said so many months.

Q. Well, Miss Cruz, you said in the beginning, indicating you weren't sure you said August or September of 1963 and later when Mr. Phelan said August, you said, yes, August. Now you said you didn't say September. Now, do you remember when this first act of sexual intercourse took place, if it ever took place?

A. Do you want the exact date?

Q. What?

A. It was August when he first invited me to his apartment. He said. . .

Q. Did you go at that time?

A. Yes, I did.

Q. Okay, when in August?

A. Well, that was September 15, August 15.

Q. Do you remember the day of the week?

A. August 15.

Q. Do you remember the day?

A. No, I don't remember the day."

The plaintiff, a nurse, testified that the child was born at term (Tr. p. 7), indicating the child would have been conceived about August 24, 1963, yet the plaintiff testified as to having two periods in September of 1963. Tr. p. 20:

"Q. When did you tell him? When did you discover you were pregnant?

A. When I had my two periods in September.

Q. You had two in September?

A. Yes.

Q. When?

A. Well, the - I always get my period in the first week of September but I had my period in September, the first week but I only had it for two days.

Q. You what? You only had it. . .

A. For two days.

Q. Yes.

A. And the last week of September I had my period again and I just had it for two days again.

Q. But you had these two periods in September?

A. Yes. Normally, I don't have menstruate twice. I had my regular. I was regular with my period."

Plaintiff's witness on rebuttal places the time of pregnancy as of June, 1963. Tr. p. 50:

"Q. Now, you say that in June, July and August you saw him three or four times a day?

A. Yes.

Q. What time of day would that be?

A. Sometimes 10 o'clock, 11 o'clock, 2 o'clock at night.

Q. What about September, Mrs. Arceo?

A. I tell you the truth, Mr. Phelan.

Q. That is Mr. Phelan.

A. I mean, Mr. Crain, I beg your pardon.

Q. What about September?

A. I got lot of work and I did not pay no attention since that. I was serious at that time in June, 1963 because I heard something from my ears.

Q. You heard something, from whom?

A. From the family, my sister, that Barce got. . .

Q. Your sister is Miss Cruz' mother?

A. Yes, that Barce got accident, pregnancy, so I just give up, what is the use."

Plaintiff's case is replete with references to witnesses who could have allegedly corroborated plaintiff's testimony. Tr. pp. 11 and 12:

"Q. Were you engaged to Mr. Ashy?

A. Well, he always told me that we will get a house. We will get married and have plenty of kids.

Q. Did Mr. Ashy tell that to anybody else in your presence?

A. Yes, he always tell them we are getting married and they could come to our wedding.

Q. Do you know of any person he said that to?

A. Yes.

Q. Could you name them?

A. Rosa Castro and many of our friends you know."

Tr. p. 14:

"Q. You testified previously that there was some sort of an engagement or what steps besides talking to some people did Mr. Ashy take?

A. Well, he said he will do anything for me and since I was a Catholic, I try to marry in the Catholic Church. So, he said he will do anything to get married so I took him to the priest you know and he was taking instructions at Sinajana.

Q. When was this that you took him to the priest?

A. This was September, 1963.

Q. Do you recall the name of the priest?

A. Yes, Father Antonine.

Q. Do you know whether or not to your knowledge you went there more than once?

A. Yes, we went there about three or four times."

On cross-examination of the defendant, plaintiff's counsel indicated there were additional corroborating witnesses. Tr. p. 41:

"Q. Didn't you tell the waitress up at Pirates Cove that you two were getting married and didn't she ask if she was invited, and didn't you tell her, yes?"

and, Tr. p. 44:

"Q. And you say you never told the waitress at Pirates Cove that you two were getting married?"

Defendant denies making this statement.

ARGUMENT

The appellant contends that the appellee has not established the paternity of the child by the greater weight of the evidence. Paternity cases are easy to bring and difficult to defend. The burden on the appellee is a preponderance of the evidence or the greater weight thereof. Her testimony need not be corroborated. Section 1844 of the Code of Civil Procedure of the territory of Guam even codifies this last statement by stating, "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

The appellee's case rests on her own testimony. Section 1847 of the Code of Civil Procedure of the territory of Guam is therefore applicable:

"A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty, or integriy, or his motives, or by contradictory evidence; and the judges are the exclusive judges of his credibility."

The appellee's testimony is self-contradictory, vague, self-interested and directly contradicted by the testimony of the appellant. Appellee's own testimony as quoted in the Question above, gave the impression that every material fact could be corroborated, such as his admission of paternity, his desire to marry her, and his taking of instruction for marriage.

In the many California cases that have been examined relative to this problem of the burden of proof in paternity cases, there is important corroboration in those cases where the burden of proof has been met. The case of Girardin v. Hall, 156 CA 2d 709, 320 P 2d 163, 1958, is one example. In this case the man admitted frequent acts of sexual intercourse and that he had indeed cohabited with the unwed mother. In the case of Berry v. Chaplin, 74 CA 2d 652, 169 P 2d 442, 1946, the man admitted prior acts of sexual intercourse but not acts at a time which would have been the normal time of conception. The court held that the prior acts tended to show the probability of a repetition of the illicit acts. Another case showing important corroboration is Whitelaw v. Whitelaw, 122 CA 260, P 2d 874, 1932. In this case the man asserted that the child could not be his because his admitted act of sexual intercourse had occurred 230 days prior to the birth of the child. In the case now on appeal there is not a single corroborative bit of testimony as to the intercourse other than the bald assertion of the appellee.

A second type of important corroboration that appears in many of the cases in which the court has found that the proof would support the judgment, is oral admission by the putative father. In the case entitled In re Girds' Estate, 157 C 534, 108 P 499, 1910, the father publicly acknowledged the illegitimate child as being his own. In the case of In re Baird's Estate, 173 C 617, 160 P 1078, 1916, the delivering physician himself testified as to the admission by the father of his paternity, and exhibited the birth certificate that the father had filled out and had registered in which he had himself named as the father of the illegitimate child. In the case now on appeal, no such corroboration exists, although again the appellee would lead the court to believe that there were witnesses to such admissions.

The testimony of the rebuttal witness, Mrs. Arceo, is contrived and contradicts appellee's testimony, not only as to the time of conception as set forth above in the Question Presented, but in the number of visits of the appellant to the appellee. In her testimony Mrs. Arceo states that the appellant was sometimes seen five times a day (Tr. p. 49).

In contrast to the appellee's own testimony and to that of the rebuttal witness called on her behalf, the testimony of the appellant is clear, unequivocal, and believable. One example of how clearly his testimony rings true is found on page 38 of the transcript, where he is asked concerning the appellee's testimony as to instructions from Father Antonine. He stated that he went twice with the appellant to see a priest, although not for the purpose she had stated, and that the priest was not Father Antonine but rather Father Kieran. One familiar with eliciting the truth from witnesses

knows that if the truth is being concealed, a complete denial is the common course. In this case the appellant admitted to visits and corrected the appellee's testimony as to the priest visited.

By virtue of Section 1847 of the Code of Civil Procedure of the territory of Guam, it is seen that the testimony of the appellee cannot be believed and therefore the appellee has failed to establish the paternity of the child by the greater weight of the evidence.

CONCLUSION

The appellant therefore prays that the Court reverse the Opinion of the District Court of Guam and dismiss the appellee's complaint.

Dated May 20, 1968, at Agana, Guam.

Respectfully submitted,

CRAIN & BENSON
Attorneys for Appellant

BY: Richard H. Benson
RICHARD H. BENSON

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard H. Benson
RICHARD H. BENSON, Attorney for Appellant